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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 12

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court
for the Northern District of California,
~~Southern Division~~

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Northern District of California, Southern Division, dated June 19, 1964, and filed June 22, 1964, denying a petition to enjoin, annul and set aside an order of the Interstate Commerce Commission and dismissing appellants' complaint. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction

of this appeal and that a substantial question is presented.

The opinion of the United States District Court for the Northern District of California, Southern Division, is reported at 230 F. Supp. 852. The opinion and order of the Interstate Commerce Commission are reported at 316 I.C.C. 795. Copies of the District Court opinion and judgment, the Recommended Report and Order of the Hearing Examiner, and the opinion and order of the Commission, are attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1336, 1398, 2284, 2321 through 2325 inclusive, and 5 U.S.C. § 1009 to enjoin, set aside and annul a report and order of the Interstate Commerce Commission. The decision of the three-judge District Court (Appendix A, p. 32a) was dated June 19, 1964, and filed June 22, 1964. Notice of appeal was filed in that court by appellants here on August 17, 1964.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156 (1962), and *American Trucking Ass'n* v. *United States,* 326 U.S. 77 (1945).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901 and 1001; and § 3(4) of the Interstate Commerce Act, as amended, 49 U.S.C. § 3(4), are set forth in Appendix B hereto.

QUESTION PRESENTED

The Western Pacific Railroad Company makes up the middle segment of a railroad through route (the Bieber route) which has been created, established, and maintained as a single unit extending between Portland, Oregon, and Los Angeles, California, for the purpose of providing railroad competition with the Southern Pacific route—the only other north-south railroad route serving the Pacific Northwest and the State of California. Union Pacific Railroad and Northern Pacific Railway, although establishing and maintaining with the Southern Pacific Company a system of through routes and rates via the Portland Gateway (the common point of interchange between Union Pacific, Northern Pacific and Southern Pacific on the one hand and the Bieber route on the other), have refused to establish a similar system with the Bieber route and have thus discriminated against Western Pacific on traffic moving through that interchange.

The question is whether Western Pacific is a "connecting line" within 49 U.S.C. § 3(4), which prohibits discriminatory rates and practices between "connecting lines", even though Western Pacific does not have a direct physical connection with Union Pacific and Northern Pacific at the common Portland Gateway and even though Western Pacific has not in the past, because of the discrimination, been permitted to make up a through route through the common interchange point of Portland.

STATEMENT

For many years prior to 1931, the only railroad route serving the Pacific Coast of the United States (including the States of Washington, Oregon, western Idaho and California) was Southern Pacific Company and its connections. In 1931 the Interstate Commerce Commission, specifically responding to a request for the institution of competitive railroad service, authorized the construction of a short segment of railroad between Klamuth Falls, Oregon, and Keddie, California. *Great Northern Ry. Co. Construction,* 166 I.C.C. 3, 170 I.C.C. 399. This construction created, for the first time, a through route parallel to and competitive with the Southern Pacific route between Portland, Oregon, and Los Angeles, California (see the map on the following page).

This route, popularly known as either the "Bieber" route or "Inside Gateway" route, has been operated from its inception as a single unit for the purpose of competing with the parallel Southern Pacific route between the same points. Of necessity, it is made up of the end-to-end connections of Great Northern Railway Company between Portland and Bieber: The Western Pacific Railroad Company between Bieber and the San Francisco-Oakland-Stockton area of northern California, and The Atchison, Topeka & Santa Fe Railway Company between Stockton and Los Angeles.

For the past 32 years this route has provided the only railroad competition with Southern Pacific Company and the only choice for shippers in this territory. For traffic moving between California and the States of northern Oregon, Washington and western Idaho, both the Southern Pacific and Bieber routes connect

with Union Pacific, Northern Pacific and Great Northern at Portland, Oregon, the only common gateway served by both competing routes. Union Pacific and Northern Pacific have, except for an extremely limited number of commodities,[1] consistently refused to join the Bieber route in through rates on the same level as those carriers participating with Southern Pacific Company, and therefore the joint rates with Southern Pacific are in virtually all instances lower than the combination rates made applicable to the Bieber route.[2]

The result is that in recent years the Bieber route has become unable to compete effectively with Southern Pacific for most traffic moving to or from points served in the Pacific Northwest by Union Pacific or Northern Pacific, although its physical facilities and services are more than adequate for the job. As the Examiner put it, the imposition of higher combination rates "precludes shippers from using the 'Inside Gateway' [Bieber route] from or to such points [in California and the Pacific Northwest]. The complainants are even deprived of traffic which they themselves originate." Appendix A, *infra*, p. 4a.

Western Pacific and its subsidiary lines challenged the present discriminatory practices by filing a complaint with the Interstate Commerce Commission under the provisions of the Interstate Commerce Act, 49 U.S.C. § 3(4), which prohibits such discriminatory rate treatment between "connecting lines" of rail-

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[1] Joint rates are in effect on cast iron pipe, automobiles and livestock. The rates on two of these products resulted from agreements with appellees after complaints were filed, and one from a Commission order. Appendix A, *infra*, pp. 14a-15a.

[2] Appendix A, *infra*, p. 12a.

road.[3] The Hearing Examiner found in favor of Western Pacific and issued an order recommending that the appellees be required to cease the discriminatory practices. Appendix A, *infra*, pp. 1a-7a. A panel of the Commission reversed, holding that since Western Pacific neither enjoyed a physical connection with Union Pacific and Northern Pacific, nor already participated in a full line of through rates with these carriers, Western Pacific was without power to challenge the discriminatory practices. The requirements for "connecting line" status, said the Commission, were set forth by this Court in *Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288, 293 (1932). Appendix A, *infra*, pp. 8a-31a.[4] The full Commission certified the case as "of general transportation importance" (Order dated February 14, 1963).

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[3] Western Pacific is treated throughout this brief as encompassing its subsidiary lines, the Sacramento Northern Railway and the Tidewater Southern Railway Company. The Union Pacific, the Northern Pacific and their shortline connections were named as defendants and are commonly referred to throughout this Jurisdictional Statement as appellees. The Great Northern and the Santa Fe were also named as defendants, since the prayer for relief requested a prescription of through routes to which they would be a party, but they were not defendants in opposition and pleaded in support of Western Pacific. Southern Pacific intervened in support of the defendants in opposition.

[4] The Commission also held that the Bieber and Southern Pacific routes are not sufficiently similar. We believe we demonstrated beyond question to the District Court that the Commission's conclusions on this score were wholly fallacious. In any event, the District Court never reached the question of similarity, deciding the case wholly on the issue of "connecting lines". If this Court notes probable jurisdiction, we intend to demonstrate in our brief on the merits and at oral argument not only that the District Court erroneously decided the connecting lines issue but that a remand for further consideration of the issue involving similarity of conditions is unnecessary, since the record fully supports our position in this regard.

Western Pacific appealed to the three-judge United States District Court for the Northern District of California, which agreed with the Commission's analysis of "connecting line" status, denied Western Pacific's petition, and dismissed the complaint. The Court cited not only *Atlantic Coast Line* but *Thompson* v. *United States,* 343 U.S. 549 (1952), and attempted to distinguish *Chicago, I. & L. Ry.* v. *United States,* 270 U.S. 287 (1926). But the court added significantly:

> Because the Supreme Court has not rendered any decision on this question since Atlantic Coast Line [32 years ago], this Court is bound to follow that decision. Any further liberalization of the present definition will have to come from the Supreme Court. [Appendix A, *infra,* p. 36a.]

THE QUESTION IS SUBSTANTIAL

The importance of this case to the transportation industry can hardly be overstated. The Commission recognized its importance by certifying the case as one "of general transportation importance"—a certification made in only .007%, or ¾ of 1%, of the eligible cases handled at the ICC.[5] The United States recognized its importance by entering the case before the Commission,[6] strongly supporting Western Pacific's position, and calling the proceeding one of "unique

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[5] In the first 37 months of the operation of the rule governing cases "of general transportation importance," only 37 cases were so certified out of the 4933 cases handled at the Commission and eligible for certification. These figures were supplied to Western Pacific in two letters, dated September 9 and September 18, 1964, from the Secretary of the Commission.

[6] The United States filed three petitions before the Commission supporting Western Pacific but took no position for or against Western Pacific before the District Court.

importance" which presented issues "of large importance with impact upon large segments of the public and a vast area of the country."[7] The District Court recognized its importance by virtually inviting this Court to review it.

The issues here are vital because, as the United States stated in one of its petitions to the Commission:

> * * * [T]he Pacific Northwest and California have rapidly increased in population, consumption and production and are expected to continue to grow. There is testimony that through routes between defendants and the Bieber route and rates at the same level as those defendants maintain with Southern Pacific would materially assist in the greater industrial development of the Pacific Northwest, provide for a greater and more competitive rail system, and generally assist in the economic growth of the whole area.[8]

As we shall show, the reliance of the District Court on *Atlantic Coast Line R. Co.* v. *United States, supra,* was misplaced. But even if that case stands for what the District Court says it does, the intervening years since it was rendered have resulted in far-reaching changes in the railroad industry. The fact is that in this age of merger, consolidation and sharing of the

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[7] "Petition of United States to Full Commission (1) to Vacate its Order Served July 30, 1963 * * *," filed August 7, 1963, pp. 5, 6.

[8] "Petition of United States to Full Commission for Reconsideration of Report and Order of Division 2 and Request of United States for Oral Argument before Full Commission," filed July 26, 1963, pp. 2-3.

nation's railroad transportation plant,[9] when so many duplicating, paralleling physical lines are disappearing, it is essential that the "Bieber route concept" be preserved. It is essential, in other words, that single-route, multi-line, end-to-end operations which provide all of the services of paralleling lines be protected against discriminatory treatment.

The present language about "connecting lines" in § 3(4) of the Interstate Commerce Act had its genesis in § 3 (par. 2) of the 1887 Act, which required that carriers afford equal facilities for the delivery of passengers and property "to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines." 24 Stat. 380. Except for the addition of the word "fares," the relevant language remained the same in the 1920 amendment. 41 Stat. 479. The latest amendment in 1940 provided that carriers must afford equal facilities for the delivery of passengers and property "to and from connecting lines; and shall not discriminate in their rates, fares and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper." 54 Stat. 903-904, 49 U.S.C. § 3(4).

It should be emphasized that the legislative history of neither the original language nor any of the amendments affords any clue as to precisely what Congress had in mind by the term "connecting lines" except

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[9] In the past seven years alone, 18 rail consolidations have been approved, and additional merger or control cases involving 21 Class I railroads are now pending. See the 78th and preceding Annual Reports of the Interstate Commerce Commission.

that "every variety of unjust discrimination" was to be prohibited.[10] Certainly there was no indication that the section was intended to carry the meaning attributed to it by the District Court in this case. The phrase apparently was patterned after several English and state statutes, and a number of early state decisions had clearly established the concept that, as one of them put it, "Railroads can be connected, either directly or by intervening roads."[11] In other words, "connecting" did not necessarily mean a direct physical connection.

The argument that a carrier must have a direct physical connection with a particular locality in order to be guilty of discrimination against that locality—a contention analogous to the one made here—was first made to this Court as early as 1917 in *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U.S. 136, 144. The Court rejected the argument, pointing out that

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[10] Remarks of Senator Cullom introducing the Interstate Commerce bill in the 49th Congress, 1st session, 17 Cong. Rec. 3476 (1886): "The third section is broader and more general in its terms [than the second section, outlawing the long-short haul differential] and * * * contains a general prohibition of every variety of unjust discrimination. * * * The second part of the section is modeled in part upon the English and in part upon similar statutes in several of the states. The purpose is to require railroads to furnish its connecting roads all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from 'freezing out' a connecting line by refusing to accept traffic from or deliver traffic to it upon any terms, as has been done."

[11] *Black* v. *Delaware & Raritan Canal Co.*, 22 N.J. Eq. 130, 402 (1871), *rev'd on other grounds*, 24 N.J. Eq. 455 (1873). See also *Atchison Ry. Co.* v. *Fletcher*, 35 Kan. 236, 10 Pac. 596 (1886); *Baltimore* v. *Baltimore & Ohio Ry.*, 21 Md. 50, 89, 91-92 (1864).

"Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them." *Ibid.*

The necessity for end-to-end connections was disposed of even more directly nine years later in *Chicago, I. & L. Ry. Co.* v. *United States,* 270 U.S. 287 (1926), which we contend is controlling here. In that case, three of the four respondent carriers refused to make reciprocal switching arrangements with the complainant South Shore electric line, just as appellees in this case have refused to make joint rates with Western Pacific. The South Shore had no physical connection with any of the three respondents and reached them only over the fourth respondent's lines. Nevertheless, the respondents were all held to have discriminated against a "connecting line," the South Shore. The Court posed the issue in this fashion:

> It is argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality; *that where there is no direct physical connection* with the railroad alleged to be discriminated against, *and no joint service is being rendered* by the three steam railroads with the South Shore, there cannot, in law, be unjust discrimination, because the existing inequality can be removed only by the consent of a third party, the intermediate carrier. [270 U.S. at 292; emphasis added.]

And the Court answered the argument in these terms:

> Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order

> may extend to every carrier who participates in inflicting the injury. [*Id.* at 293.]

Thus, the Court dispelled any notion that a direct physical connection was necessary and, further, that the lack of prior arrangements for a through transportation service deprived a carrier of standing to complain of the discrimination.

Contrary to the assertion of the District Court, *Atlantic Coast Line R. Co.* v. *United States, supra,* either is distinguishable from or actually supports the instant case. There, the Court was construing not § 3(4) of the Act but rather the conditions of a lease which had been approved by the Commission. Nevertheless, the Court's language bears on this case, because the lease guaranteed non-discriminatory rates for lines "connecting" with the Clinchfield Railroad. As the Court put both the argument and the answer to it:

> The plaintiffs contend that the restrictive schedules [then being proposed] are consistent with the conditions [in the prior lease] because the Georgia & Florida is not a carrier "connecting with the Clinchfield." The argument is that the Georgia & Florida does not connect since its own rails do not physically abut on the Clinchfield's rails—the connection being made over the Piedmont & Northern, an intermediate carrier. There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route. [284 U.S. at 293; footnote deleted.]

Several points should be noted. First, the Court clearly held that in common parlance, "connecting"

does not necessarily mean a physical, end-to-end connection. Secondly, the "through route" to which the Court referred was made up of the Georgia & Florida, the Piedmont & Northern, and their more distant connections, which is a route comparable to the Santa Fe, the Western Pacific and the Great Northern in this case. In other words, there *is* a "through route" in the instant case in the sense in which the term was used in *Atlantic Coast Line.* Western Pacific has readily conceded, however, that no "through route" exists here in the sense proposed by the Commission and the District Court, namely, that *the appellees* have held themselves out as offering through transportation service with the Bieber route. The reason there has been no such through service is apparent: the appellees have refused to extend it, and this is precisely the discrimination Western Pacific is attacking.

Having determined that the appellees and the Bieber route together constituted the relevant "through route," the District Court in this case turned to *Thompson* v. *United States,* 343 U.S. 549, 557 (1952), for a definition of "through route." But *Thompson* was considering quite a different problem—one having nothing whatever to do with discriminations between connecting lines under §3(4) of the Act. *Thompson* dealt with § 15(4), which prohibits the Commission from establishing through routes and joint rates when a carrier participating in such a through route would be required to "short haul" itself, *i.e.,* "to embrace in such route substantially less than the entire length of its railroad." Since a carrier can waive its right to its own long haul and accept a Commission route which results in a short haul, the question in *Thompson* was whether the petitioning carriers had in fact waived

their rights by previously offering the public a through service over their respective lines.[12]

The language used by the Court in that case not only has no logical relationship to this one but, if made applicable here, results in a complete anomaly. For if appellees in the instant case had chosen to accord Western Pacific joint rates but at a higher level than the rates they accorded Southern Pacific, the Commission and the District Court would not have hesitated to find an illegal discrimination under § 3(4). Yet because appellees have refused to accord Western Pacific any joint rates at all while at the same time granting them to Southern Pacific, the Commission and the District Court take *Atlantic Coast Line* and *Thompson* to mean that Western Pacific has no standing to object. As the United States put it in one of its petitions to the Commission, "On this reasoning a carrier which has physical facilities to handle traffic with a distant line which reaches it by an intermediary line but chooses to favor the distant line's competitor may take the disadvantaged line entirely out of the protection of section 3(4) by consistent and effective adherence to a refusal to deal."[13]

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[12] The Court has itself recognized that the language in *Thompson* was hardly all-inclusive. It has said: "We there emphasized the purpose of § 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunkline 'short-hauls' without faithful observance of restrictive conditions imposed by that section. At the same time we recognized that Commission action is not necessary to the creation of through routes. We pointed out that a through route is *ordinarily* a voluntary arrangement, express or implied, between connecting carriers, and that the existence of such an arrangement depends on the circumstances of particular cases." *Denver & Rio Grande Western R. Co.* v. *Union Pacific R. Co.*, 351 U.S. 321, 327 (1956) (emphasis added).

[13] Petition of United States, *supra* n. 7, p. 9.

Atlantic Coast Line and *Thompson* cannot possibly be read as requiring such a result, and § 3(4) cannot by logic or language be given such an interpretation. On the contrary, as this Court said in *Louisville & Nashville R. Co.* v. *United States,* 282 U.S. 740, 749-750 (1931):

> The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. * * * This court has said that the language of the Act "is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn."[14]

In short, "Section 3 outlaws discrimination in all its forms" (*Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56, 60 (1956)), and an artificial interpretation of the section, based not on the intent of Congress but on a mistaken view of this Court's decisions, serves only to perpetuate the very kind of monopolistic combination that the Act has long been recognized as prohibiting.

Although made up of end-to-end connections of separately-owned railroads, the Bieber route was conceived, constructed and operated as a single line to provide competition to Southern Pacific. In any case involving the frustration of that purpose, Western Pacific cannot be treated merely as a completely separate segment of the whole. Even if a physical connection with Portland were necessary, Western Pacific fully qualifies as the essential middle link of the Bieber route, a route which serves no useful

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[14] Citing *The Shreveport Case,* 234 U.S. 342, 356 (1914). See also *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 450 (1945); *New York* v. *United States,* 331 U.S. 284, 296 (1947).

purpose except as a whole unit. Hampering the maintenance of such a route results in uneconomical and grossly wasteful transportation, contrary to the clear dictate of the National Transportation Policy (preceding 49 U.S.C. § 1). The fact that the Bieber route concept (avoidance of unnecessary duplication of physical facilities) was "ahead of its time" does not justify the refusal to accord its members the right to obtain relief from discriminatory practices. This is particularly true where the discrimination is treated as its own justification. It would be a mockery of the law if a carrier's refusal to engage in nondiscriminatory practices were to form the very cornerstone of its justification.

A voluntary publication of a full line of through rates cannot possibly prove harmful. Where, as in the case of cast iron pipe, the traffic has been allowed to move without the shackles of discriminatory rates, it has moved smoothly and without complaint. There is no reason why the rest of Western Pacific's traffic moving to or from the Union Pacific and Northern Pacific cannot do likewise. Certainly the shippers whose interests are most immediately at stake strongly favor the competitive, nondiscriminatory rates which Western Pacific is seeking.[15]

This case, then, involves far more than the loss to the Western Pacific of an estimated 25,000 freight cars

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[15] Sixteen shipper representatives, representing many varied industries, testified in favor of the nondiscriminatory rates. In addition, after the report and order were issued in this case, over 100 requests from shippers were filed with the carrier rate bureaus for voluntary publication of the rates that Western Pacific was seeking through its complaint. The Commission, however, did not reopen the case for the introduction of this latter evidence. See "Complainants' Petition for Further Hearing for Purpose of Introducing Newly Developed Evidence," filed December 28, 1962.

a year,[16] as important as that loss is. The discontinuance of discriminatory rates in this case would protect and enhance present intramodel competition and would help develop one of the most dynamic and fast-growing sections of the country.[17] It would, in fact, remove the last barrier to the very competition that the Commission held was so essential when it established the Bieber route[18] and that is even more essential today.

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[16] Appendix A, *infra*, p. 17a.

[17] The record shows, for example, that population growth on the Pacific Coast has taken place at a rate three times that of the nation as a whole, that value added by manufacturing and farm marketing cash receipts have both been increasing in this area at rates significantly higher than for the entire country, and that personal income increased 503% between 1940 and 1958 on the Pacific Coast as compared with 355% for the United States. These and other indicators of past and projected growth are shown on Ex. 17, 18; Tr. 42-50, 221-222.

[18] The Commission stated at that time in its *Great Northern* opinion, *supra*, 166 I.C.C. 3: "San Francisco and Portland are now connected directly by the rails of but a single carrier. The California Railroad Commission points out that this dependence upon the ability of a single rail carrier is without parallel as between comparable agricultural and industrial centers anywhere in the United States. [*Id.* at 33.] • • • The proposed line would give that much more transportation and furnish an alternate route should an existing line be broken. Its distance from the coast would be an additional protection against coast or air raids. A witness stated that in a time of National emergency existing lines between California and Oregon would be inadequate unless the country had received ample warnings. [*Id.* at 37.] • • • The new line will aid in the development of a great timber area and some considerable agricultural areas in northern California. As we said in *Construction of Lines in Eastern Oregon*, 111 I.C.C. 3, 37: 'Advantages to the shippers of an additional outlet for their product are apparent. It is desirable that transportation facilities of a high order be available to shippers from the Klamath Basin and central Oregon. The assurance of access to lines other than the Southern Pacific at critical periods is a factor of prime importance to such shippers and is clearly in the public interest. Competition within reason rather than monopoly is in the public interest.' " [166 I.C.C. at 39.]

But on an even higher level, the correct interpretation of § 3(4) by this Court at this time would provide one answer to the revolutionary transformation now taking place in the railroad industry, with virtually every large rail carrier in the country being rationalized by one method or another. We respectfully suggest that this is no time in our history to penalize our smaller carriers, particularly by a misinterpretation of a decision by this Court rendered 32 years ago.

Respectfully submitted,

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APPENDIX A

INTERSTATE COMMERCE COMMISSION

Served August 10, 1961

No. 33679

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL.

v.

CAMAS PRAIRIE RAILROAD COMPANY, ET AL.

Decided .....

Report and Order
Recommended by John F. Wright, Hearing Examiner

On February 10, 1961, the Western Pacific Railroad Company (Western Pacific) and its wholly owned subsidiaries Sacramento Northern Railway (Sacramento Northern), and Tidewater Southern Railway Company (Tidewater Southern), filed a complaint charging the defendants[1] with violations of sections 1 and 3 of the Interstate Commerce Act. The violations are alleged to occur as a result of the refusal of the Northern Pacific, The Union Pacific and their short line connections to join the complainants and the Santa Fe and The Great Northern in the publication of through routes and divisions between California points and points in Oregon, Washington and Idaho on the same basis as that granted by the said

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[1] The defendants are Camas Prairie Railroad Company (Camas Prairie), Great Northern Railway Company (Great Northern), Northern Pacific Railway Company (Northern Pacific), Pacific Coast Railroad Company (Pacific Coast), Spokane International Railroad Company (Spokane), Union Pacific Railroad Company (Union Pacific), Walla Walla Valley Railway Company (Walla Walla), Washington, Idaho & Montana Railway Company (Washington, Idaho & Montana) and the Atchison Topeka & Santa Fe Railway, (Santa Fe).

defendants to the complainants' competitor, the Southern Pacific.

By answers duly filed the Great Northern, the Pacific Coast and the Santa Fe stated that they were all willing to establish voluntarily a general line of competitive joint through freight rates as sought by the complainants. At the hearing the Washington Idaho and Montana made a similar statement on the record and expressed its support of the complainants.

The complainants operate 987 miles of railway lines within the State of California. Some of the major point served by them are San Francisco, Oakland, Alameda, San Jose, Stockton and Sacramento.

The relief sought by the complainants is limited to the area of California, Oregon, Washington and Idaho. Relief is especially sought between points in California and points on the lines of the Union Pacific and Northern Pacific and their short line connections in Oregon, Washington and Idaho. The relief would be applicable to the "Inside Gateway", that is, to traffic moving between points in California via Bieber, Calif., and Portland, Oreg., and thence from or to other points in Oregon, Washington, and Idaho.

The Bieber route, or "Inside Gateway", has been in existence since 1931 and was certificated by the Interstate Commerce Commission in *Great Northern Ry. Co. Construction*, 166 I.C.C. 3, 170 I.C.C. 399. It is one of two major railroad routes through Portland that serve California generally and the Pacific Northwest. The route of the "Inside Gateway" consists of the lines of the Santa Fe, Western Pacific, and the Great Northern.

The second major route is made up of the Northern lines and the Southern Pacific. South of Portland this route is either single line via the Southern Pacific or in conjunction with Santa Fe south of Stockton.

There is another route which serves Southern California but not The Central or Northern Areas. This is the Union Pacific from the Pacific Northwest through Salt Lake City, Utah, and thence to Southern California.

Since the construction of the "Inside Gateway" in 1931 the complainants have participated with the Great Northern in a full line of joint rates via Bieber between points in California and Portland, Oreg., and thence to other points on the lines of the Great Northern in Oregon, Washington and Idaho. These rates are competitive since they are generally the same as those published by the Great Northern with the Southern Pacific via Portland, Oreg., and with the joint rates published by the Northern Pacific and Union Pacific via Portland with the Southern Pacific.

The Southern Pacific and the complainants both serve Northern California generally and have many common points.

The Northern Pacific maintains joint rates with the Southern Pacific via Portland between points in California and points in Oregon, Washington and Northern Idaho. It has an interchange at Portland with the Great Northern but refuses to publish rates via Bieber in connection with the complainants.

The Union Pacific has joint rates with the Southern Pacific between joints in California and points on its line in Oregon, Washington and Idaho. It declines to participate with the complainants from or to the same points via Portland and Bieber over the present routes in effect between the Great Northern and the complainants although the Great Northern connects with the Union Pacific at Portland.

The result of this rate situation is that between points in California and points in the Pacific Northwest when either the Southern Pacific, the Union Pacific or the Northern Pacific participate in a routing with the complainants,

in most instances, combination rates higher than the joint through rates are applicable. Naturally this precludes shippers from using the "Inside Gateway" from or to such points.

The complainants are even deprived of traffic which they themselves originate. A good example is a shipper at Sacramento located on the Western Pacific. This shipper had made numerous carload shipments to Pacific Northwest points exclusive to the Northern Pacific and the Union Pacific during 1959. The traffic moved via the Southern Pacific because of the higher combination rates which would be applicable via Bieber.

In 1960 the shipper applied for through competitive rates via Bieber to destinations on the Northern and Pacific and Union Pacific and their short line connections. In its application the shipper stated that the use of the existing route via Southern Pacific to Portland imposed additional transportation charges over and above those that would apply if the rates were established via Bieber. The additional charges were the Western Pacific's charges for the switch from the shipper's plant to the interchange with the Southern Pacific. These were not absorbed because the traffic was non competitive under the terms of of the Southern Pacific's tariff.

Early in 1961 the Southern Pacific satisfied the shipper by making an exception to its general practice of absorbing switching charges only on competitive traffic. It amended its tariff to provide for absorption of the switching charge at Sacramento. This reduced the shipper's transportation costs to the through rate level and at the same time effectively prevented the complainant Western Pacific from participating in line haul traffic originated on its own line.

The "Inside Gateway" carries considerable traffic to and from Northern California and beyond. The Santa Fe forms the southern segment of the route. During the

five year period 1955 to 1959 the bridge traffic hauled by the Western Pacific ranged from 28,655 to 34,077 carloads. Nevertheless the route is not used to its full capacity. It carried much more traffic during World War II. The complainants' witnesses estimated that because of the lack of joint through rates via Bieber the complainants have been foreclosed from participation in the line haul handling of approximately 25,000 cars per year.

The complainants presented the testimony of 15 shippers. The witnesses represented diverse industries as well as various freight traffic associations. In the main, their testimony was that an additional route would improve railroad service and would avoid any further competitive damage because of the penalties incurred when shipping to points on the complainants' lines. Some of them have found that service via the "Inside Gate", when shipping to and from Great Northern points, to be faster than the Southern Pacific route. They also testified that the additional route would create greater flexibility for transit users.

The defendants interrogated most of these witnesses as to whether or not their testimony had been solicited by the complainants. On brief they endeavored to minimize the testimony of the witnesses because it was solicited. The fact that the testimony was solicited does not of itself affect its weight. The evidence submitted by such witnesses is helpful to the Commission and should be encouraged.

The defendants argue, and presented evidence to the effect, that the through routes and joint rates sought are neither desirable nor required by the public interest and that they would result in an inefficient and wasteful transportation service contrary to the national transportation policy. They further contend that the establishment of through routes would violate section 15(4) of the act. They also claimed that, with minor exceptions, there are no

through routes existing via Bieber between points in California and points on the defendants' lines.

Relying on *Chicago, N., St. T. & P. R. Co.* v. *Spokane, P&S. Ry., Co.*, 300 I.C.C. 453 they say that the existence of joint through rates on only two commodities, that is, pipe and automobiles, does not evidence the existence of through routes on any commodities other than those specifically covered by the published tariff. In addition to those commodities the Commission has heretofore prescribed joint rates via the Bieber route for livestock and class rated traffic.

On brief, the complainants, without waiving their allegations of unjustness and unreasonableness based on section 1(4) of the act, directed their entire argument to the violation of section 3(4), the unlawful discrimination. The mentioned defenses raised by the defendants relate primarily to issues involving sections 15(3) and 15(4) of the act. In the examiner's view of this proceeding problems involving those sections of the act are not reached.

"The defendants in opposition interchange traffic at Portland in the haul of which the complainants participate via Bieber, at competitive joint through rates insofar as cast iron pipe, automobiles, livestock and class rated traffic are concerned. The same facilities used for these interchanges are employed in connection with such higher combination rated traffic that moves via Bieber. There is no difference in the manner of interchange. Nevertheless, the defendants in opposition refuse to participate at competitive rates in an interchange of other traffic at Portland in which the complainants participate via Bieber. At the same time they afford the complainants' competitor, the Southern Pacific a full line of joint through rates via Portland. There is no justification in this record for such treatment of a connecting line. The granting of a full line of rates to one railroad at an interchange point while at the same time limiting the extent of such rates to the

favored line's competitor is the essence of discrimination. It is the type of unlawful discrimination that section 3(4) of the act aims to prevent. It is, of course, a matter for the defendants in opposition, in the discretion of their management to determine the means of eliminating the unlawful discrimination."

The examiner finds and concludes that the defendants' refusal to interchange traffic at Portland, other than cast iron pipe, automobiles, livestock and class rated traffic, in the line haul of which the complainants participate via Bieber, at rates competitive with those afforded the Southern Pacific by them is an unlawful discrimination in violation of section 3(4) of the act and should be removed.

Premises considered it is the ORDER of the examiner that the defendants be, and they are hereby, notified and required to cease and desist, within 45 days from the date this recommended order becomes the order of the Commission and becomes effective pursuant to the provisions of section 17(5) of the Interstate Commerce Act, and thereafter to abstain, from practicing the unlwawful discrimination found herein.

By the Commission, John F. Wright, Hearing Examiner.

Dated at Washington, D. C., this 31st day July, A.D., 1961.

HAROLD D. McCOY,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION

Service Date August 2, 1962

No. 33679

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

v.

CAMAS PRAIRIE RAILROAD COMPAN[illegible] ET AL.

Decided July 26, 1962

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Report of the Commission

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND HERRING

FREAS, *Commissioner*:

Exceptions to the report and order recommended by the examiner were filed by the defendants and the intervener, and the complainants replied. We have heard the parties in oral argument. Our conclusions differ from those recommended. Exceptions and requested findings not discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on February 10, 1961, The Western Pacific Railroad Company, and its short-line subsidiaries,[1] hereinafter sometimes collectively called the Western Pacific or complainants, allege that the failure and refusal of the defendants[2] to establish and maintain, between points

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[1] The Sacramento Northern Railway (Sacramento Northern) and the Tidewater Southern Railway Company (Tidewater Southern).

[2] The Atchison, Topeka and Santa Fe Railway Company (Santa Fe), Camas Prairie Railroad Company (Camas Prairie), Great Northern Railway Company (Great Northern), Northern Pacific Railway Company (Northern Pacific), Pacific Coast R. R. Co.

in California, served by the complainants or in connection with the Santa Fe, and points in Oregon, Washington, and Idaho, served by the defendants, chiefly the Union Pacific and the Northern Pacific, joint through rates over routes through Bieber, Calif., and Portland, Oreg., on the same basis as those maintained by the defendants in connection with the Southern Pacific Company (Southern Pacific) through Portland, violates sections 1(4) and 3(4) of the Interstate Commerce Act, and is contrary to the provisions of the national transportation policy. We are asked to prescribe just, reasonable, and nondiscriminatory competitive joint through rates, charges, practices and through routes. We are also asked to hold open this proceeding in the event the parties are unable to agree on divisions, so that the Commission may prescribe divisions.

The Santa Fe, the Great Northern, Pacific Coast, and Washington, Idaho and Montana have indicated their willingness to establish and maintain the routes and rates sought. The Western Pacific, Washington, Idaho and Montana, and numerous shippers and shipper associations presented evidence in support of the complaint, whereas the Union Pacific, Northern Pacific and Southern Pacific (intervener) presented evidence in opposition.

General location of the railroads concerned—The complainants operate for nearly 1,000 miles in California and serve such cities as San Francisco, Oakland, San Jose, Stockton, Sacramento, Modesto, Marysville, Keddie, Bieber, and Oroville. The east-west line of the Western Pacific extends from Salt Lake City, Utah, to the San Francisco-

(Pacific Coast), Spokane International Railroad Company (Spokane), Union Pacific Railroad Company (Union Pacific), Walla Walla Valley Railway Company (Walla Walla), and Washington, Idaho and Montana Railway Company (Washington, Idaho and Montana). The Camas Prairie is jointly owned by the Northern Pacific and Union Pacific. The Spokane is a subsidiary of the Union Pacific, and the Walla Walla is a subsidiary of the Northern Pacific.

Oakland bay area, with a north-south line extending from Keddie to a connection with the Great Northern at Bieber, 490 miles south of Portland. The Western Pacific connects with the Santa Fe at Stockton, permitting service to and from points in southern California, and also with the Union Pacific at Wells, Nev., and Salt Lake City, So far as the territorial scope of this complaint is concerned, it does not physically connect with the lines of the principal defendants, the Northern Pacific and the Union Pacific, and does not reach the involved interchange point at Portland.

The Great Northern, Union Pacific, and Northern Pacific serve, among others, numerous points in Oregon, Washington, and Idaho. In addition to the connections previously noted, to the extent here important, the Great Northern, Union Pacific, Northern Pacific, and Southern Pacific connect at Portland; and the Union Pacific and Southern Pacific connect at Ogden, Utah, and Wells. In the northwestern area, the Great Northern and its connections are competitive with the Northern Pacific. In California, the Southern Pacific is competitive with the Western Pacific and the Santa Fe, and the Union Pacific also serves portions of southern California.

Routes.—The two major routes considered herein are hereinafter called the Bieber route and the Southern Pacific route. The former, to Great Northern destinations, has been in existence since 1931. See *Great Northern Ry. Co. Construction*, 166 I.C.C. 3, 170 I.C.C. 399. This route to such destinations consists of the Santa Fe to Stockton, thence the Western Pacific to Bieber, and the Great Northern beyond; or from origins on the Western Pacific, that carrier to Bieber, thence the Great Northern. The Southern Pacific route consists of the Southern Pacific to Portland, thence the Northern Pacific, Union Pacific, or the Great Northern, depending upon the carrier serving the northwestern destination. The Santa Fe also participates in the

Southern Pacific route on certain movements to or from California points.

The routes sought herein generally consist of the Bieber route as above defined over the Great Northern to Portland, thence the Northern Pacific or the Union Pacific depending upon the carrier serving the northwestern destination.

The Union Pacific, whose line reaches California in the Los Angeles area, participates in routes between points in California on the complainants' lines and northwestern points on its line east of Huntington, Oreg., with interchanges at Salt Lake City and Wells. It also has a route between southern California and certain points in the northwest via Salt Lake City and Pocatello, Idaho. The Union Pacific and the Southern Pacific also participate in routes via Wells or Ogden.

Present rate structure.—The Great Northern participates with the complainants[3] in joint through class and commodity rates for application over the Bieber route. These joint rates are generally the same as those maintained by the defendants in connection with the Southern Pacific through Portland. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company also maintains joint rates with the complainants over routes through Bieber. Also, the Union Pacific participates in joint rates with the complainants over routes through Salt Lake City or Wells, similar to those maintained by that defendant with the Southern Pacific over routes through Ogden or Wells.

The defendants have maintained the joint rates with the Southern Pacific through Portland for over 50 years. The Northern Pacific has refrained from establishing joint rates through Bieber with its strongest competitor, and it is fearful that the establishment of such rates would enable the Great Northern to solicit its traffic. The Union Pacific feels that the existing rates are sufficient to meet the needs

[3] Also the Santa Fe.

of the shipping public. These defendants, however, favor additional rates through Bieber if and when a need therefor is demonstrated. Thus, there are, with some exceptions, no joint rates over the routes sought, and the shipments must move under combination rates, using the rates, local or joint, from and to Portland. These combination rates are generally higher than the joint rates maintained by the defendants with the Southern Pacific.

Traffic may now move over the Bieber route between points on the complainants' lines in California and points in the Northwest served by the Northern Pacific or the Union Pacific and the Great Northern, if interchange facilities with the latter[4] are available at the northwestern point of origin or destination. The charges on such traffic are based on the complainants' and the Great Northern's joint through rates, plus the switching charge for interchange service, except that the switching charge is absorbed by the Great Northern if the point on the complainants' line has interchange facilities with the Southern Pacific.

Traffic may also move via Portland between points served by the complainants and the Southern Pacific, where interchange facilities exist, and points on the Northern Pacific or the Union Pacific which are not served by the Great Northern. A switching charge is made for the interchange in addition to the joint rate published by the Southern Pacific and the Northern Pacific or the Union Pacific.

The complainants point out that the present rate situation deprives them of an opportunity to participate in the line-haul service on traffic originating on their lines. For instance, the Campbell Soup Company, whose Sacramento plant is located on the Western Pacific, shipped over 150

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[4] Portland and Bend, Oreg., Vancouver, Chehalis, Seattle, Tacoma, Spokane, and Centralia, Wash., are representative examples of such points.

carloads of traffic to points served exclusively by the Northern Pacific or the Union Pacific in 1959. This traffic moved over the Southern Pacific route because the combination rates applicable over the route through Bieber exceeded the switching charge and the joint rates in connection with the Southern Pacific.

In 1960, the Campbell Soup Company sought through competitive rates from Sacramento via Bieber to destinations on the Northern Pacific and the Union Pacific or their short-line connections so that its charges might be reduced by avoiding the charge for switching by the Western Pacific. In 1961, the Southern Pacific authorized the absorption of this switching charge. This reduced the shipper's transportation costs, but the Western Pacific still was denied an opportunity to participate in the line-haul movement.

Between points on the Western Pacific and those on the Northern Pacific or the Union Pacific, a number of joint commodity rates are maintained over routes of the complainants' lines to or from a junction point in California with the Southern Pacific, thence that line through Portland and the defendants beyond. The complainants agreed to establish these rates in connection with the defendants over such routes because they are needed to allow shippers located on the complainants' lines to reach markets in competition with other California producers. Otherwise, where switching service is not available at the origins or destinations, the lowest combination rates are charged over any route permitting interchange with the Southern Pacific in California, or the Great Northern and Northern Pacific or Union Pacific in Oregon, Washington, or Idaho.

On canned goods from McHenry, Calif., to Yakima, Wash., the lowest combination is based on Stockton, and applies only over the Tidewater Southern to Stockton, thence the Southern Pacific to Portland, and the Northern Pacific or the Union Pacific to destination. There are

canners at Yuba City, Calif., on the Sacramento Northern, but that carrier and the Southern Pacific do not interchange traffic thereat. The lowest rates from Yuba City to Walla Walla, Wash., for example, are combinations over Marysville, Calif., using the local rate of the Sacramento Northern to Marysville and the joint rate of the Southern Pacific and the Northern Pacific or the Union Pacific beyond. These rates deprive the complainants of a line-haul although they originate the traffic.

Between points on the Northern Pacific or the Union Pacific and those on the Santa Fe (except in the San Francisco Bay area), joint rates are maintained over routes including the Southern Pacific. Only higher combination rates are available between the same points over the routes sought herein through Bieber. The complainants argue that this denies to the public the advantages of alternate routes and deprives the Western Pacific of an opportunity to participate in the movement of the traffic.

The complainants now have lower combination rates on forest products from Olympia, Shelton, and other points in Washington on the Northern Pacific to San Francisco Bay points, than the joint rates maintained in connection with the Southern Pacific to the same points. However, the complainants fear that this adjustment is temporary, and that this traffic will again be confined to the Southern Pacific by a reduction of the joint rates.

There are joint commodity rates on cast iron pipe, automobiles, and livestock, in addition to joint class rates, from points on the complainants' lines to points on the lines of the defendants over the routes sought. The joint rates on cast iron pipe, from Carpenter, Calif., on the Western Pacific to points in Oregon, Washington, and Idaho on the Northern Pacific or the Union Pacific, were established on June 21, 1952, as the result of a complaint[5]

[5] The complaint was dismissed after the parties advised that they had reached a satisfactory rate adjustment.

filed by the United States Pipe & Foundry Company. These rates are the same as those in effect to the same points from Decoto, Calif., on the Southern Pacific, with interchange at Portland. The Northern Pacific and the Union Pacific receive the same divisions of these rates north of Portland on the traffic through Bieber as they receive from the joint rates maintained in connection with the Southern Pacific. In 1959 and 1960, respectively, 124 and 154 carloads of this pipe moved.

The joint rates on automobiles from Melrose (Oakland), Calif., and Decoto, on the Western Pacific, are the same as the rates from the same points on the Southern Pacific to destinations on the Northern Pacific or the Union Pacific. These rates became effective on October 4, 1959, following the filing of a complaint, which was dismissed at the request of the complainant. The plant for which these rates were published was never built, and thus there have been no movements.

The joint rates on livestock were established as a result of our order in *American National Live Stock Assn.* v. *Atchison, T. & S. F. Ry. Co.*, 122 I.C.C. 609, and subsequent reports. The class rates were established in 1956 following our order in *Class Rates, Mountain-Pacific Territory*, 296 I.C.C. 555. There were no movements of livestock or of class-rated traffic over these routes in 1960.

In addition to the foregoing movements, a total of 19 carloads in 1959 and 11 carloads in 1960, of government and commercial traffic were handled over the routes sought between the considered points. The rates charged are not shown, but it is reasonable to assume that they were on a combination basis.

The Bieber-route movement.—The complainants use the Bieber route in transporting traffic between points in western transcontinental territory. During the 5 years beginning with 1955, this route was responsible for approximately 20 percent of the Western Pacific's total

freight revenues. This territory produced about 50 percent of the freight cars handled by the Western Pacific and 38 percent of its freight revenues. Excluding the joint movements with the Santa Fe, the Western Pacific's revenue per car in 1959 averaged $169.63 northbound and $171.86 southbound over the Bieber route. It estimates that its revenues per car would average about $144 northbound and $146 southbound if competitive rates were established over the routes sought.

More than 50 percent of the cars moving over the Bieber route are between points on the Great Northern and points on the Santa Fe. For the five-year period above mentioned, the annual average was 30,982 cars over the Bieber route and 7,226 over the Southern Pacific route. In 1959, the traffic moving via the Bieber route in connection with the Santa Fe produced for the Western Pacific revenues per car of $126 northbound and $116 southbound. The Western Pacific estimates that its revenues per car would average about $101 northbound and $93 southbound if competitive rates were established over the routes sought in connection with the Santa Fe.

The traffic and rail service here concerned.—The Pacific Northwest and California have, in the last 20 years, increased their population, consumption, and production at a rapid rate, and continued growth is expected. The complainants urge that rail service in this territory must be expanded to meet this economic growth, and that there is need for the competitive routes through Portland. The Portland Freight Traffic Association, made up of various civic bodies and some 150 large shippers in Oregon and Washington, stress that the routes and rates sought by the complainants would materially assist in the greater industrial development of the Pacific Northwest, provide for a greater and more complete competitive rail system, and generally assist in the economic growth of this area.

The Western Pacific has improved its transportation plant to keep pace with the economic growth mentioned,

but it is moving only about 75 percent of the volume handled by it in its heaviest war year, 1945, when the line was not as well maintained as it is today. It is ready, willing, and able to meet any demand for service over the route sought through Bieber. Along its line it has some 30 different areas of about 4,500 acres of potential industrial land. It competes for industrial plants with other carriers in California, and in the absence of joint rates and routes to and from points in Oregon, Idaho, and Washington, it maintains it has had difficulty in attracting industries to its lines. Of the 100 industries which located along its lines in the past three years, 85 are served, through switching arrangements or otherwise, by the Southern Pacific, and 70 of these also by additional railroads. Attempts to locate several new industrial plants along its lines were unsuccessful because of a need for service to points in the Northwest on the Union Pacific, the Northern Pacific, or their connections, and joint rates were not available. In the last 30 years the complainants have been unable to obtain traffic from industries served by these defendants. A survey of 142 such industries indicated that more than 25,000 carloads are moving annually which are not available to the complainants because of the lack of competitive rates. About 2,250 carloads originate or terminate on the lines of the complainants and move to or from points at noncompetitive rates.

The Longview Fibre Company has plants at Longview and Seattle, Wash., Oakland, Los Angeles, and other points. From Longview, except for the single-line route of the Union Pacific to Los Angeles, on shipments to California, it is restricted to routes embracing the Southern Pacific. It urges that the routes sought would make available more empty cars and give rise to faster, more efficient, and more flexible service. However, this shipper may now use five routes to California, consisting of the Union Pacific direct, the Union Pacific to Portland and the Southern Pacific beyond, the Northern Pacific to Portland and the Southern

Pacific beyond, the Great Northern to Portland and the Southern Pacific beyond, and the Great Northern to Bieber and the Western Pacific beyond.

Centennial Mills, Inc., owns and operates flour mills at Spokane and Portland. Its grain is supplied from Washington and Oregon, and moves to Spokane and Portland over the Union Pacific, the Northern Pacific, or the Spokane, Portland & Seattle Railway Company (SP&S). Only limited quantities originate on the Great Northern in Washington for the reason that few grain elevators are located along that road. This company's flour and millfeed are sold in California at the Portland price, plus a transit balance of 44.5 cents per 100 pounds, based on rates on eastern Washington grain, to northern California, and 52 cents, based on rates on Montana wheat, to southern California. The latter presents no problem to this shipper, since the Montana wheat generally originates on the Great Northern, but at times it secures Great Northern wheat only to find that the transit balance to northern California exceeds 44.5 cents. Also, on shipments to destinations in northern California on the Western Pacific, there is an occasional shortage of Great Northern transit billing from Washington; as a result, this shipper must use the Montana transit billing and absorb the 7.5-cent difference. Centennial desires the routes and rates sought by the complainants, because they would provide greater flexibility to its transit operations and eliminate the 7.5-cent penalty.

The plant of the Pacific Coast Paper Mills, at Bellingham, Wash., is located on the line of the Great Northern, but it is also served by the Northern Pacific through switching arrangements. It prefers to use the Bieber route to California which it has found to be faster. However, it has used the Southern Pacific route because of car shortages on the Great Northern. It feels the Northern Pacific's participation in joint rates through Bieber would increase the number of available cars and eliminate the penalty when

shipping over the Northern Pacific through Bieber. It states also that the routes sought would facilitate delivery.

The Consolidated Dairy Products Company is located at Seattle on the Northern Pacific but is also accessible to the Great Northern through switching arrangements. The switching at Seattle takes 24 hours, but faster service over the Bieber route makes up for this delay. Consolidated believes that the competitive rates and routes through Bieber would eliminate the delay, since the Northern Pacific would move the shipments to Portland; and that they would increase the rail competition between carriers, resulting in better and more flexible rail service. Moreover, the Northern Pacific has provided for storage and repacking-in-transit privileges at Seattle, and Consolidated could ship butter from Ellensburg, Wash., to California points over the routes sought by taking advantage of these transit privileges at the joint rates not now applicable over such routes from and to these points. In 1959 and 1960, this company used the Bieber route for one-third of its shipments to Los Angeles with the balance moving over the Southern Pacific route.

The American Pipe and Construction Company of Portland purchases steel raw materials for fabricating at various points, including Kaiser, Calif., which is served by the Santa Fe and Southern Pacific. Steel purchased at Kaiser and shipped to Portland by the Southern Pacific can be fabricated in transit and then shipped over the Great Northern, the Union Pacific, or the Northern Pacific. The route through Bieber is used in some instances, but then the steel fabricated at Portland must move to points on the Great Northern. This shipper must keep constant check on the inbound movements to Portland in order to know what steel products can be shipped beyond to points on the Union Pacific or the Northern Pacific. It would be to the advantage of this shipper if it were relieved of the present complexities in transit operations brought about by the

failure of these lines to provide competitive routes and rates.

The foregoing is representative of the testimony presented by 15 shippers in the forest products, pulp, grain products, cottonseed meal, paper, paper articles, food, and iron and steel industries. They support the complainants. The defendants stress that these shippers have been aware of the lack of joint rates and through routes through Bieber for the last 31 years and have not submitted a written request to the defendants for relief. However, some verbal requests have been made. In the last six years only one shipper requested the Northern Pacific to establish joint rates through Bieber, and that request was handled to the satisfaction of the shipper.

Operating routes north of Portland.—The SP&S, which owns the Oregon Trunk Railway and the Oregon Electric Railway, is owned and under the common management and control of the Northern Pacific and the Great Northern. As material here, it has a water-grade line north of the Columbia River, extending east and west, between Portland and Spokane through Vancouver, Wishram, and Pasco, Wash., with the north-south line of the Oregon Trunk extending between Bend, Oreg., and Wishram, through Oregon Trunk Junction, Oreg. The SP&S is a party to the joint rates with the Southern Pacific, interchanging at Portland, and is used by the Northern Pacific as an alternate route between Portland and points on the Northern Pacific east of the Cascade Mountains, Yakima, Wash., and east, the interchange between the SP&S and the Northern Pacific being at Pasco or Spokane. This results in more economic and expeditious service than over the longer route of the Northern Pacific through Auburn, Wash., and is requested by some shippers. Unless transit or some other reason requires use of the longer route, traffic brought into Pasco by the Northern Pacific for movement beyond to points in California is turned over to the SP&S.

The Great Northern uses the lines of the Oregon Trunk and SP&S under car-haul contracts, and in transporting over the Bieber route, operates over the lines of these carriers between Bend and its connections with the SP&S at Vancouver, on the west, and Fort Wright Junction (near Spokane), Wash., on the east. Traffic over the routes sought would be handled over the SP&S to Portland.

Under the routes sought, the Northern Pacific would be unable to use the shorter SP&S route between Portland and Pasco. Instead, it would use its more circuitous route through Auburn for movement to points east of the Cascade Mountains. The complainants argue that the defendants could handle the traffic from Portland the same as it is handled over the Southern Pacific route. However, it would not be so routed and would require a backhaul over the SP&S between Wishram and Portland. The route sought over the Northern Pacific from Portland, to Spokane, for example, would require a movement over the SP&S of 106 miles west from Wishram to Portland, and 533 miles over the Northern Pacific through Auburn to Spokane, or 639 miles, whereas from Wishram east over the SP&S to Pasco, thence the Northern Pacific to Spokane, the distance is 271 miles. Thus, the route sought to Spokane on the Northern Pacific is 368 miles longer than over the lines of these carriers east from Wishram to Spokane, and would require crossing the Cascade Mountains at an elevation of 2,837 feet.

The route of the Union Pacific from Portland sought herein to Spokane, for instance, requires a westward movement from Wishram over the SP&S through Vancouver to Portland, thence the Union Pacific in an eastward direction along the south bank of the Columbia River through Oregon Trunk Junction, which is across the river from Wishram. These westward and eastward movements aggregate slightly more than 200 miles.

From San Francisco to Walla Walla, Wash., on the Northern Pacific, the route sought through Bieber and

Portland, thence the Northern Pacific is 1,339 miles, whereas the route of the Southern Pacific to Portland, thence the SP&S to Pasco and the Northern Pacific to Walla Walla is 1,014 miles. The distance using the Southern Pacific to Portland and the Northern Pacific through Auburn and Pasco is 1,170 miles; and through Bieber and Bend, thence the Oregon Trunk, the SP&S to Pasco, and the Northern Pacific to Walla Walla, the haul is 971 miles, or 368 miles shorter than the route sought.

The routes sought to points west of the Cascade Mountains would require a movement from Vancouver to Portland and return to Vancouver, a distance of 20 miles. This distance, although short when compared to the longer distances and out-of-line movements east of the Cascades, represents costly and wasteful transportation to and from Portland, as substantial bridge mileage is involved.

The Portland Transfer.—Cars moving over the routes sought herein (for convenience the northbound movement will be used) from points in California would be interchanged at Portland by the Union Pacific or the Northern Pacific and the Great Northern. The cars would arrive on the tracks of the SP&S; they would be yarded at its Vancouver yard for classification, and those for the Northern Pacific and the Union Pacific would be transferred by the SP&S service to the Northern Pacific Terminal Company's[6] Lake yard. This yard is 8 miles from the Vancouver yard across the Columbia River and Willamette River Bridges. The cars for the Northern Pacific would be interchanged at the Lake yard, and there is no indication that such interchange would differ from that between the Northern Pacific and the Southern Pacific.

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[6] The Northern Pacific Terminal Company is a switching railroad owned jointly by the Union Pacific and the Southern Pacific. However, 25 percent of the Northern Pacific Terminal Company's Lake yard at Portland is owned by the Great Northern and 75 percent by the Northern Pacific.

At the Lake yard, the cars are inspected by the Northern Pacific Terminal Company's mechanical forces, and those for the Union Pacific are transported about 2 miles by the terminal company to its Depot yard, where the cars are given prescribed air tests and then transferred to the Union Pacific. The crews and engines of the latter company move the cars about 2.5 miles over the Steel Bridge[7] spanning the Willamette River to the Union Pacific's Albina yard, where the trains are made up. Thus, between Vancouver and the Albina yard, a car moves about 12.5 miles, and the elapsed time averages 13 hours and 20 minutes. For this movement the cost to the Union Pacific is $3.69 per car, or $3.25 to the terminal company and 44 cents for handling over the Steel Bridge.

Cars moving from points in California over the Southern Pacific route for interchange with the Union Pacific at Portland are delivered to the Southern Pacific's Brooklyn yard in groups arranged in transit for easy transfer to the Union Pacific's Albina yard. These yards are in Portland, about 4.5 miles from each other. The transfers are made by the Southern Pacific's engines and crews in about 45 minutes, and the cars are delivered in time for the Union Pacific's outbound movements. In this transfer, the car moves about 4.5 miles, and the elapsed time averages 3 hours and 20 minutes between arrival at the Brooklyn yard and delivery to the Albina yard. The cost to the Union Pacific for this service is 46.88 cents.

Operating routes south of Portland.—In most instances, the Bieber route between points in California considered herein and Portland is longer, has more interchanges, goes through more engine districts, and has higher rises and more curvature than the Southern Pacific route. From

[7] The Steel Bridge is jointly owned by the Union Pacific and the Southern Pacific. Maintenance and operation of the bridge is supervised by the Union Pacific, but the expense is divided among railroads making use of it on the basis of cars moved over it.

Los Angeles to Portland, for example, the Southern Pacific route (direct) is 1,098 miles long, with one interchange; the Bieber route (Santa Fe—Western Pacific—Great Northern) is 1,313 miles long, with three interchanges. The Southern Pacific route encounters 9 engine districts; the Bieber route 12. These respective routes have total curvatures of 47,613 and 58,722 degrees; respective rises of 12,560 and 14,324 feet; aggregate rises of 27,389 and 32,357 feet; and a maximum rise in 1 mile of 138 and 176 feet. From Stockton to Portland, the same routes are 702 and 788 miles long.

From San Francisco to Portland, different routes are used for carload and less-than-carload traffic. Since joint class rates, which usually apply on less-than-carload traffic, have been established, the latter routes need not be considered. The Southern Pacific route is 801 miles long with one interchange; the Bieber route, using the Western Pacific, is 880 miles long with two interchanges, but in connection with the Santa Fe, it is 866 miles with three interchanges. The Southern Pacific route encounters 8 engine districts, and both Bieber routes encounter one barge movement and 8 engine districts. The Southern Pacific route, and two Bieber routes have total curvatures, respectively, of 38,028, 47,094 and 45,933 degrees; respective rises of 8,165, 8,753, and 8,367 feet; aggregate rises of 19,381, 21,121, and 20,539 feet; and a maximum rise in 1 mile of 131, 133, and 133 feet. The above figures indicate the transportation conditions are more favorable over the Southern Pacific route than over the Bieber route between Portland and points in California.

The Southern Pacific, using western-district costs and Rail Form A, developed out-of-pocket costs over the Bieber route which exceed those over the Southern Pacific route to Portland by 25 percent from Los Angeles and 15 percent from San Francisco. According to the Southern Pacific, these cost data do not take intc consideration differences in such matters as total degrees of curvature, feet

of rise, and total rise, which it is claimed would result in greater differences in favor of its route.

Transit time.—A car moving from Los Angeles to Lewiston, Idaho, over the Southern Pacific to Portland, thence the SP&S to Pasco, and the Northern Pacific beyond, would be in transit approximately from 8 a.m. Monday to 3 a.m. Friday, and over the same route to Walla Walla to 7 a.m Friday. Using the Northern Pacific through Auburn, the time would be about 24 hours longer, and this would be true over the route sought. The fastest route between these points is through Bieber, thence the Oregon Trunk to Wishram, the SP&S to Pasco, and the Northern Pacific beyond, which under favorable conditions would be 24 hours less than over the fastest Southern Pacific route, and 48 hours less than the route sought. From Los Angeles to Seattle, the shortest time over Southern Pacific route in connection with the Union Pacific is 44 hours, which is 26 hours less than over the route sought. From Spokane to Los Angeles using the Union Pacific, the shortest time over the Southern Pacific route would be 55.5 hours, whereas it would require at least 81 hours over the Bieber route.

Short hauling the defendants.—The defendants contend that the establishment of the routes sought would short-haul them in violation of section 15(4) of the act. As shown herein, the SP&S is under the common control and management of the Northern Pacific and Great Northern.[8] The routes which the complainants seek to establish would require the Northern Pacific to exchange traffic with the Great Northern at Portland despite the fact that the SP&S and the Oregon Trunk extend beyond to Bend. The Union Pacific also operates for 246 miles between Portland and Bend, and it connects with the Great Northern at the

[8] We have held that the SP&S must be regarded, for ratemaking purposes, as a part of the Northern Pacific and the Great Northern systems rather than as an independent line. See *Helix Milling Co., Inc.*, v. *Great Northern Ry. Co.*, 287 I.C.C. 77, 78.

latter point. If the routes sought were established, it would be required to interchange traffic with the Great Northern at Portland, which would short-haul it by 246 miles on every movement.

DISCUSSION AND CONCLUSIONS

The complainants rely primarily on the alleged violation of section 3(4) of the act. That section requires equality of treatment between connecting lines, but the equality of treatment is determined by similarity of circumstances and conditions. *Routing, Coal from Origins on Louisville & N. R.*, 313 I.C.C. 752, 758, and proceedings cited therein.[9] The routes sought through Bieber and Portland are longer and involve more difficult operating conditions than the Southern Pacific route, and they require hauls in a general direction opposite to the direct movement.

Equality is required only between connecting lines. The complainants do not physically connect with the defendants at any point along the Bieber route. The connection is made by the Great Northern at Portland. Insofar as rail carriers are concerned, connecting lines are those carriers having direct physical connections or making up a through route. In *Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288, the court found that

> There is no warrant for limiting the meaning of 'connecting lines' to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route.

While the court was construing a lease under section 5(2), the Commission had imposed a condition therein similar to the requirement under section 3(4) that carriers shall not

[9] Our action was sustained in *Atlantic Coast Line Railroad Co., et. al.* v. *United States, et. al.*, C.A. 1811, M.D. Ga., April 17, 1962.

discriminate between connecting lines. This definition of connecting lines was later adopted by the court in *Atchison, T. & S. F. Ry. Co.* v. *City of Chicago*, 240 F. (2d) 930, 937, in connection with the application of section 3(4).

According to this view, the complainants would be connecting carriers with the defendants at Portland only if the present routes constitute through routes. The criteria for the determination of whether a through route exists are set out in *Thompson* v. *United States*, 343 U.S. 549, 557, as follows (the quotation is from the Commission's 21st Annual Report to Congress):

> . . . Existence of a through route is to be determined by the incidents and circumstances of the shipment, such as the billing, the transfer from one carrier to another, the collection and division of transportation charges, or the use of a proportional rate to or from junction points or basing points. These incidents named are not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments.
>
> In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.

In *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, 155 I.C.C. 313, the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as noted by the court, in the above-cited case, "* * * one shipment was not representative of the carriers' course of business." In *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U.S. 321, the Court held that the evidence before us in *Denver & R. G. W. Co.* v. *Union Pac.*

R. Co., 287 I.C.C. 611 did not compel a finding that through routes were in existence. The evidence indicated, as noted on page 618 of our report, that 55 shipments a year had moved on through bills of lading over the routes sought, as compared with thousands from and to the same points at joint rates over existing routes. The conduct of the major defendant had been to preserve its long haul and keep the route sought closed. It had used the route sought only in compliance with instructions from the shippers or the prior carriers. Thus, we concluded that the 55 shipments over the route sought must be regarded as of an isolated nature and insufficient to show the existence of a through route, since any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress.

In *Chicago, M., St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, affirmed in *Chicago, M. St. P. & P. R. C.* v. *United States*, 366 U.S. 745, the record indicated that 513 shipments had moved at joint rates over the route sought, but thousands had moved over other available routes subject to joint rates. The traffic was not solicited nor did it move at the higher combination rates over the route sought. We concluded that, with the exception of the above-mentioned shipments, the route sought was not a through route within the meaning of section 15.

In the instant proceeding, 278 carloads of cast iron pipe moved at joint rates from points on the complainants' lines over routes through Bieber and Portland to points on the defendants' lines in 1959 and 1960. During that time, 30 carloads of government and commercial traffic also moved at combination rates over such routes. However, the defendants have not solicited nor encouraged the movement of traffic over the routes sought, but for more than

30 years have tried to keep those routes commercially closed, except where the few joint rates above mentioned were established. While the complainants have solicited traffic for movement over routes through Bieber and Portland to points on the defendants' lines, those actions do not show a holding out on the part of the defendants to offer through transportation. Thus, the few shipments made at combination rates do not prove the existence of effective through routes. It follows that, except where joint rates now exist, no effective through routes exist between points in California on the lines of the complainants and their connections, and points in the Northwest on the lines of the defendants, through Bieber and Portland. There is, therefore, no basis for a finding that the carriers are connecting lines within the meaning of section 3(4). Even if the complainants were connecting carriers, the evidence of record does not establish the similiarity of circumstances and conditions which justifies equality of treatment.

While the complainants have indicated a willingness to rely alone on the alleged violation of section 3(4), they also allege other violations and request the prescription of through routes and joint rates over the routes sought. Section 1(4) of the act requires, among other things, that the railroads establish reasonable through routes with each other, and just and reasonable rates applicable thereto. Where such routes are not established voluntarily, we have the authority under section 15(3) of the act to prescribe them whenever deemed by us to be necessary or desirable in the public interest. This authority is restricted by section 15(4), which provides that we "shall not * * * require any carrier by railroad * * * to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route * * * ".

As above indicated, there are numerous routes between points in the areas here considered over which joint rates apply. The shippers urge that the rates and routes sought would give them more freedom of choice in the movement of their goods, would improve transportation service, time in transit and car supply, and make available additional transit privileges. Nothing of record, however, indicates that the existing through routes and joint rates are inadequate to meet the needs of the shipping public. In fact the failure of the shipper witnesses to initiate in the last 31 years a determined campaign to persuade the defendants of the necessity of establishing through routes between points on the complainants' lines in California and points on the defendants' lines in the Northwest, is at least some indication of the adequacy of the existing routes. The expression "in the public interest" means more than a mere desire on the part of shippers for something that would merely be convenient or desirable for them. This desire must be weighed against the effect on other carriers and the general public. On the basis of this record, we cannot find that the public interest would be served by requiring the establishment of joint rates and through routes which are substantially slower and costlier than the present routes.

Additionally, the evidence indicates the routes sought would in many instances short-haul other carriers without their consent. In the absence of a showing by the complainants that the present routes maintained by the defendants are unreasonably long or do not provide adequate, efficient, or economical transportation, we are precluded by the provisions in section 15(4) from prescribing through routes.

We find that the failure and refusal of the defendants to establish through routes and joint rates with the complainants through Bieber and Portland, between points in California, on the one hand, and points in Oregon, Washington, and Idaho, on the other, on the same basis as

those published in connection with the Southern Pacific through Portland, is not shown to be unjust or unreasonable, nor to result in discrimination against the complainants in violation of section 3(4) of the act; and that the establishment of through routes and joint rates in connection with the complainants, through Bieber and Portland, is not shown to be necessary or desirable in the public interest.

An order will be entered dismissing the complaint.

COMMISSIONER GOFF concurs in the result.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 26th day of July, A. D. 1962.

No. 33679

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

v.

CAMAS PRAIRIE RAILROAD COMPANY, ET AL.

This proceeding being at issue upon complaint on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, division 2.

HAROLD D. McCOY
Secretary.

(SEAL)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41779 Civil

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, ET AL., *Defendants*.

Order Denying Petition

Before MERRILL, Circuit Judge, and SWEIGERT and ZIRPOLI, District Judges.

ZIRPOLI, District Judge:

This is an action brought under the Judicial Code, Sections 1336, 1398, 2284 and 2321 through 2325 of Title 28, United States Code, to enjoin, annul and set aside a report and order of the Interstate Commerce Commission. The plaintiffs, Western Pacific Railroad and its subsidiaries,[1] claim that the defendants[2] are engaged in discriminatory rate practices at the Portland, Oregon interchange, in violation of Section 3(4) of the Interstate Commerce Act; 49 U.S.C. § 3(4). Section 3(4) provides as follows:

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[1] The Sacramento Northern Railway and the Tidewater Southern Railway Company.

[2] The defendants named in the complaint filed in the Commission action were: The Atchison, Topeka & Santa Fe Railway Company; The Great Northern Railway Company; The Northern Pacific Railway Company; The Union Pacific Company; The Camas Prairie Railroad Company, jointly owned by Northern Pacific and Union Pacific; The Pacific Coast R. R. Co; The Spokane International Railroad Company, a subsidiary of the Union Pacific; and the Washington, Idaho and Montana Railway Company. The Northern Pacific and Union Pacific and their subsidiaries denied the allegations of the complaint. The Great Northern, Pacific Coast, Santa Fe and the Washington, Idaho and Montana answered the complaint with expressions of willingness to establish and maintain the routes and rates sought. The Southern Pacific Company intervened in opposition to the complaint.

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Several issues were ruled on by the Commission which are challenged here[3]; but since we agree with the Commis-

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[3] The Commission noted that although plaintiffs had "indicated a willingness to rely alone on the alleged violation of Section 3(4)", they had not withdrawn their Section 1(4) [Title 49 U.S.C. Sec. 1(4)] allegations nor their request for "prescription of through routes", a remedy related to a Section 1(4) rather than a Section 3(4) violation (316 I.C.C. at 810). The Commission ruled on both issues. On the Section 3(4) issue after a lengthy discussion of the law and the facts, the Commission found (316 I.C.C. at 810):

"There is, therefore, no basis for a finding that the carriers are connecting lines within the meaning of section 3(4)." It then went on to say: "Even if the complainants were connecting carriers, the evidence of record does not establish the similarity of circumstances and conditions which justifies equality of treatment." This last quoted issue this Court need not and does not reach. On the section 1(4) issue, which plaintiffs do not now urge, the Commission found (316 I.C.C. at 811): "On the basis of this record, we cannot find that the public interest would be served by requiring the establishment of joint rates and through routes which are substantially slower and costlier than the present route." The Commission ordered plaintiffs' complaint dismissed because (316 I.C.C. 811):

"We find that the failure and refusal of the defendants to establish through routes and joint rates with the complainants through

sion's conclusion that plaintiffs are not a "connecting line" within the meaning of Section 3(4) of the Act, we find it unnecessary to resolve the remaining issues presented by the complaint.

The factual background of this case is as follows: The two routes considered herein are called the Bieber route and the Southern Pacific route. The former was created by an order of the Commission in 1931 and was designed to be a competitor with the Southern Pacific route. See *Great Northern Ry. Co. Construction,* 166 I.C.C. 3, 170 I.C.C. 399. For purposes of this case, the Bieber route consists of the Santa Fe from points in southern California to Stockton, California, thence Western Pacific to Bieber, California, and thence Great Northern to Portland, Oregon. This line extends along the eastern side of northern California through eastern Oregon to Wishram on the Columbia; from Wishram the line runs to Vancouver, Washington and thence to Portland, Oregon. The Southern Pacific route extends from points in southern California by either Santa Fe or Southern Pacific, through the central part of northern California and Central Orgeon to Portland. Southern Pacific and defendants have maintained a system of through routes and rates at the Portland interchange for over 50 years. With the exception of a few commodities, defendants have refused to establish

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Bieber and Portland, between points in California, on the one hand, and points in Oregon,Washington, and Idaho, on the other, on the same basis as those published in connection with the Southern Pacific through Portland, is not shown to be unjust or unreasonable, nor to result in discrimination against the complainants in violation of section 3(4) of the act; and that the establishment of through routes and joint rates in connection with the complainants, through Bieber and Portland, is not shown to be necessary or desirable in the public interest."

Other issues raised in the complaint before this Court, and which this Court need neither reach nor resolve, relate to the evidence, testimony rejected and findings of fact that the Commission is alleged to have either failed to make or erroneously found.

a similar system of through routes and rates with Western Pacific.

A connecting line within the meaning of Section 3(4) is one which has either a direct physical connection at the common interchange or is one which makes up a "through route" through the interchange point. *Atlantic Coast Line R. Co.* v. *United States,* 284 U.S. 288 at 293 (1932). Because Western Pacific terminates at Bieber, California and is therefore the middle link in a three line route, it does not have a direct physical connection with the defendant at Portland, Oregon.

The criteria for the determination of whether a through route exists are set forth in *Thompson* v. *United States,* 343 U.S. 549, 557 as follows:

> "Existence of a through route is to be determined by the incidents and circumstances of the shipment, such as the billing, the transfer from one carrier to another, the collection and diversion of transportation charges, or the use of a proportional rate to or from junction points or basing points. These incidents named are not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments.
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> *"In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service.* Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." (Emphasis added)

Plaintiff properly concedes that it does not meet the above test[4] because the existence of a few instances of joint

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[4] Plaintiff's opening brief, page 8, states: "There is little doubt that, under the doctrine of the *Thompson* case, supra, there are not, as yet, a full line of through routes over the Bieber route to or from Northern or Union Pacific points."

rates and through routes on some commodities is not sufficient to establish a through route generally. *Chicago M. St. P. & P.R. Co.* v. *Spokane P. & S. Ry. Co.*, 300 I.C.C. 453 (1957), aff'd *Chicago M. St. P. & P.R. Co.* v. *United States*, 366 U.S. 745 (1961); *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321 (1956). Therefore, because plaintiff does not meet the test of the *Atlantic Coast Line* case, it is not a "connecting line" within the meaning of section 3(4).

Plaintiff's reliance on *Chicago, I. & L. Ry.* v. *United States*, 270 U.S. 287 (1926) is misplaced. This case involved reciprocal switching arrangements and presented no question of whether the carriers in that case were "connecting lines" for section 3(4) purposes. Moreover, the case was decided prior to the *Atlantic Coast Line* case. Plaintiff's principal argument is that the definition of a "connecting line" is not limited to the definition of *Atlantic Coast Line*. This Court is satisfied that the present definition fully comports with the statutory purpose, and that any further expansion of the term is not warranted. Because the Supreme Court has not rendered any decision on this question since *Atlantic Coast Line*, this Court is bound to follow that decision. Any further liberalization of the present definition will have to come from the Supreme Court.

IT IS THEREFORE ORDERED that the petition to enjoin, annul and set aside the order of the Commission is denied, and the complaint is dismissed.

Dated: June 19, 1964.

CHARLES M. MERRILL
Circuit Judge

WILLIAM T. SWEIGERT
District Judge

ALFONSO J. ZIRPOLI
District Judge

APPENDIX B

The National Transportation policy, 54 Stat. 899, 49 U.S.C. preceding §§1, 301, 901 and 1001:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(4) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. §3(4):

> Interchange of traffic. All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers

or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.